



REPUBLIC OF KENYA



**Kariuki & 2 others v Karai & 4 others (Civil Suit 983 of 1996)
[2022] KEHC 13017 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 983 OF 1996**

**JK SERGON, J
SEPTEMBER 23, 2022**

BETWEEN

**JOHN MUTURI KARIUKI 1ST PLAINTIFF
MWANGI THUO 2ND PLAINTIFF
JULIUS GITAU KARIUKI 3RD PLAINTIFF**

AND

**MONICA NYOKABI KARAI 1ST DEFENDANT
KABIRI WANGUNYU 2ND DEFENDANT
MUNGAI S/O NGANGA 3RD DEFENDANT
NDUNGU KARARI 4TH DEFENDANT
CHIEF LAND REGISTRAR, NAIROBI 5TH DEFENDANT**

RULING

1. The interested party/applicant in this instance has brought the notice of motion dated February 3, 2020 which is supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for an order for the removal of caution lodged by Muturi Kariuki the 1st plaintiff on August 29, 2007.
2. In opposing the said motion, the 4th plaintiff filed the replying affidavit sworn on October 6, 2020. The 1st plaintiff did not oppose the motion.
3. I have considered the grounds set out on the face of the motion dated February 3, 2020 and the facts deponed in the rival affidavits.



4. In his supporting affidavit, Rumba Kinuthia stated that this court ordered that the land in question be surveyed, but the process cannot be finished since one of the parties filed a caution to frustrate the process.
5. He avers that he is aware that the 1st plaintiff, John Muturi Kariuki, would like the caution lifted, but some parties to the lawsuit are taking advantage of his advanced age to keep the caution in place. If the court has any doubts, the 1st plaintiff should be ordered to appear in court.
6. In response, the 4th plaintiff/respondent stated that the supporting affidavit sworn in support of the motion by Dominic Thagishu Karari dated February 3, 2020 is fatally defective and should be struck out for want of capacity by the deponent who is not a party to the primary suit and that there is no indication of the defendants authorizing him to depose on their behalf.
7. The 4th plaintiff/respondent further stated that there is no suit properly before court for determination and that an action for the removal of a caution needs to be commenced by way of plaint in which suit the plaintiff needs to prove why the defendant has no right to place a caution by the defendant needs to be removed.
8. He avers that an order for the removal of caution is in the form and nature of a mandatory order and that these orders cannot be granted at the interim stage as the applicants have not met the threshold set under the law for granting such orders.
9. The 4th plaintiff/respondent is apprehensive that the applicant will interfere with the subdivision and ownership of the property to the detriment of all other parties if the caution placed on the property is lifted, thus going against the instructions given by this court that the provincial surveyor must proceed independently and in accordance with the law to complete its survey and subdivision.
10. A determination as to whether or not any person stands to suffer any prejudice if the caution filed against the title held by the applicants can only be made if the process of removing a caution as contemplated in law is followed. That is to say, there is need for the applicant to apply to the registrar for removal of the caution. In that application, the applicants would give the reasons for seeking removal of the caution. The registrar would then, write to the cautioner to show cause why the caution should not be removed. In that regard see sections 133 of the [Registered Land Act](#) which in the relevant parts provides as follows:-

“

- “73. A caution may be withdrawn by the cautioner or removed by order of the court
- (1) or, subject to subsection (2), by order of the registrar.
 - (2) The registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
 - (3) If the cautioner has not raised any objection at the expiry of the time stated, the registrar may remove the caution.
 - (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the registrar, in writing, of the objection within the time specified in the notice, and the registrar shall, after giving the parties an opportunity of being heard, make such order as the registrar considers fit, and may in the order provide for payment of costs.



“78(1) The registrar may, at any time and on an application by any person interested or at the registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) upon the application of a proprietor affected by a restriction, and upon notice to the registrar, the court may order a restriction to be removed, varied, or otherwise order as it deems fit, and may make an order as to costs.”

11. As pointed out herein above, there is no evidence of any order issued by the court requiring the 1st plaintiff to remove the caution and restriction hereto. The only orders given were that the provincial surveyor is to independently and in accordance with the law carry on and complete its survey and subdivision and that the caution has not and will not in way affect the survey and subdivision.
12. There is no evidence that the applicant made the application contemplated in sections 133 of the [Registered Land Act](#) cited above.
13. In the case of [Wanjara & 2 Others v Wanjara](#) [2004] eKLR Vishram J dismissed an objection where the respondent/ applicant in the objection argued that the court had become functus officio. That the honourable court did not have the jurisdiction to entertain an application to remove a caution in view of the provisions of the [Registered Land Act](#), Cap 300, Laws of Kenya.
14. The objection was premised on the argument that the orders sought by the appellant/applicant ought first to be requested for at the appropriate Land Registrar’s office as required by law under section 133 (2) of the [Registered Land Act](#), Cap 300. That the applicant must first apply to the Land Registrar to remove the caution registered against the suit land, and only after the registrar has determined the same, may an applicant apply to the High Court. His lordship held that:

“... This argument is wholly untenable, and without any basis in law. Section 133 (1) of the [Registered Land Act](#) clearly outlined the methods by which a caution may be removed. It states as follows:

“133 (1) A caution may be withdrawn by the cautioner or removed by the court or subject to subsection (2) by order of the registrar.” In any event, this court’s original and unlimited jurisdiction cannot be ousted by any other procedure.”
15. Whilst this court has power to order for removal of the caution/restriction herein, it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the applicant should invoke the process provided in section 133(2) (3) (4) of the [Registered Land Act](#), 2010 as it is only through that process that it may be determined that there is no person with an interest in maintenance of the caution.
16. Further the respondent had stated that that the supporting affidavit sworn in support of the motion by Dominic Thagishu Karari dated February 3, 2020 is fatally defective and should be struck out for want of capacity by the deponent who is not a party to the primary suit and that there is no indication of the defendants authorizing him to depose on their behalf.
17. It is clear that the applicant was not a party to the primary suit and further to that there is no form of evidence showing that the defendants had given him authorization
18. The upshot of the foregoing is that the applicant has not made up a case for being granted the orders sought. Consequently, the application is dismissed with each party bearing their own costs.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
23RD DAY OF SEPTEMBER, 2022.**

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

.....for the Defendant/Applicant

